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Supreme Court of the United States.

October Term, 1938.

No. 827.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
APPELLANT,

v.

ELIAS R. WILCOX,
APPELLEE.

APPEAL FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of El Banco Popular de Economias y Prestamos de San Juan, P.R., Appellant.

ROYD E. JONES,
PHILIP H. JONES,
Solicitors for Appellant.

ADDISON C. HARRIS, LAW PRINTER, WASHINGTON, D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 960.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
APPELLANT,
v.
ELIAS B. WILCOX,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of El Banco Popular de Economias y Prestamos de San Juan, P.R., Appellant.

STATEMENT OF THE CASE.

This is an equity appeal from a final decree (r. p. 99) of the Circuit Court of Appeals for the First Circuit reversing the final decree (r. p. 34) of the District Court of the United States for the District of Porto Rico which ordered the appellee (hereinafter referred to as the defendant) to pay to the appellant (hereinafter referred to as the plaintiff) $9631.92, the amount due on two mortgages of real estate in Porto Rico, the unpaid principal of which amounted to $6300, and directed in default of such payment a foreclosure of the

mortgages by sale, thus establishing a personal liability of the defendant for said indebtedness which could be enforced as to any deficiency by suit against him.

Coney v. *Winchell,* 116 U.S. 227, 230.

The jurisdiction of the District Court is based wholly upon the facts alleged in the bill (r. p. 2) and admitted by the answer (r. p. 17), that the defendant is a citizen of the United States and that the matter in dispute exceeds the sum of $1000.

The appellee filed a motion to dismiss this appeal on jurisdictional grounds, and the question of jurisdiction has been argued on briefs heretofore filed.

Consideration of the question of jurisdiction having been postponed by the Court, the appellant will reargue that question herein.

There is thus presented the plaintiff's first proposition; namely:

1. The decree of the Circuit Court of Appeals is not final and the Supreme Court has jurisdiction on appeal to review it.

Excepting as otherwise pointed out, the following facts found by the District Court are undisputed:

On the 14th day of January, 1913, the defendant as a purchaser and one Landron as vendor executed a deed of purchase and sale whereby for the expressed consideration of $7832.25 Landron conveyed to the defendant certain improved real estate in San Juan declared by the deed to be subject to the mortgages in question, which by the terms of the deed the defendant assumed and covenanted to pay as a part of said consideration, the balance being the release to Landron by the defendant of a claim of $1532.25 held by the defendant

against him (Defendant's Exhibit E, r. pp. 31, 32; Findings of District Court, r. pp. 85, 86; Final Decree of the District Court, r. pp. 34, 35; Opinion of the Circuit Court of Appeals, r. pp. 90-99).

One of these mortgages executed by Landron on July 29, 1909, to the plaintiff, registered August 3, 1909, was conditioned to secure the payment of $4600 on July 29, 1910, with interest at the rate of 1 per cent monthly, and for the payment to the amount of $500 of attorney's fees and expenses in case of judicial proceedings to enforce the mortgage (Plaintiff's Exhibit A, r. pp. 80, 82; Finding of District Court, r. p. 85). The other mortgage was executed by Landron to the plaintiff on December 3, 1912, registered January 28, 1913, and was conditioned to secure the payment of $1700 on December 3, 1913, with interest at the rate of 1 per cent monthly (Plaintiff's Exhibit B, r. p. 83; Finding of District Court, r. p. 85).

The defendant by his amended answer alleged in substance that he was induced to execute the deed of purchase and sale by the false representation of Mr. Monserrat, the president of and a stockholder in the plaintiff; that it was in accordance with an oral agreement between the parties to the deed that the defendant should assume only the mortgage for $4600, and that the defendant was then ignorant of the existence of the mortgage for $1700 (Answer, par. 3, r. pp. 17, 18).

On this issue the testimony of the witnesses was conflicting and the District Court judge before whom the witnesses appeared and testified found in favor of the plaintiff (Opinion of District Court, r. p. 86). The Circuit Court of Appeals, notwithstanding the finding

of the District Court to the contrary, found that Monserrat purposely concealed from the defendant the fact that the deed of purchase and sale obligated the defendant to pay the $1700 mortgage, and that the District Court therefore erred in finding that the defendant was responsible for and bound to pay the sum called for by that mortgage (Opinion of Circuit Court of Appeals, p. 97).

The plaintiff's first, second, third, fourth, fifth, thirteenth and fourteenth assignments of error (r. pp. 100, 101) present its second proposition; namely:

2. The Circuit Court of Appeals erred in finding that Monserrat purposely concealed from the defendant the fact that the deed of purchase and sale obligated the defendant to pay the $1700 mortgage, and in finding that the District Court erred in deciding that the defendant was bound to pay the sum called for by that mortgage.

Section 20 of the Notarial Law of Porto Rico of March 8, 1906 (section 1998 of the Compilation of 1911), provides as follows:

> "The following public instruments shall be null and void:
>
> "First. Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.
>
> "Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument are witnesses thereto."

Mr. Monserrat, the notary who authorized the deed of purchase and sale, was the president of the plaintiff and a stockholder (r. p. 50). On his appeal from

the decree of the District Court the defendant assigned as error the omission or refusal of the District Court to find that the deed was null and void because of Monserrat's official relation to the plaintiff and his interest as a stockholder therein (Defendant's Tenth and Eleventh Assignments of Error, r. p. 65). The Circuit Court of Appeals ruled that under the first clause of the above section Monserrat, by reason of his official relation and stockholding, was disqualified to act as the notary authorizing the deed of purchase and sale and that the deed was a nullity (r. pp. 97, 98).

Under the plaintiff's sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth assignments of error (r. p. 101) there is presented its third proposition; namely:

3. The Circuit Court of Appeals erred in ruling that the deed of purchase and sale was a nullity on the ground that Monserrat, the notary who authorized the same, was disqualified to act by reason of his official relation to the plaintiff and his interest as a stockholder.

The plaintiff's bill did not waive answer under oath, but called upon defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated and he was therein especially interrogated (r. p. 4).

Defendant's answer, which was under oath, after answering specifically the different allegations of the bill, proceeds in part as follows (r. pp. 19, 20):

> "IX. And your orator further submits as a fact constituting a violation of law well known to the said Monserrat and to the said Landron, that at the time said Monserrat acknowledged said bill of sale

> or deed as a Notary Public . . . the witnesses to the execution of said instrument were in his employ, all of which your orator submits is in violation of the law of Porto Rico, and your orator submits whether or not said acknowledgment does not, under said law, make said instrument null and void."

The plaintiff offered no evidence in denial and the defendant offered no evidence in support of paragraph IX.

The Circuit Court of Appeals ruled that these allegations of the answer were responsive to the bill and must be taken as true, and that the deed was null, void and unenforceable because the witnesses to the deed were the clerks or servants of the notary (r. p. 98).

The plaintiff's sixth, seventh, tenth, thirteenth and fourteenth assignments of error (r. p. 101) present its fourth proposition; namely:

4. The Circuit Court of Appeals erred in deciding that the deed of purchase and sale was null and void and the provisions thereof unenforceable on the ground that the witnesses to the same were the clerks or servants of Monserrat, the notary authorizing the same.

The Court of Appeals held that the bill should have been dismissed, "it having been brought against Wilcox as the owner of the equity when in fact he was not the owner, the deed to him being a nullity and Landron not having been made a party" (r. p. 99).

There is thus presented the plaintiff's fifth proposition under its thirteenth and fourteenth assignments of error (r. p. 101); namely:

5. Even if it be assumed that the deed of January 14, 1913, was null and void, the decree of the District Court should not have been reversed and the bill dismissed, but a decree of foreclosure should have been granted.

Other alleged errors were assigned by the defendant upon grounds which were not noticed by the Circuit Court of Appeals. It would suffice to say that they are without merit, but as the record presents them for the consideration of this Court—

> *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U.S. 334, 349—

there is thus presented the plaintiff's sixth proposition; namely:

6. The decree of the Circuit Court of Appeals cannot be sustained upon any of the grounds raised by defendant's assignments of error which were not relied upon by the Circuit Court of Appeals as grounds for its reversal of the decree of the District Court.

ARGUMENT.

I.

The decree of the Circuit Court of Appeals is not final and the Supreme Court has jurisdiction on appeal to review it.

The Supreme Court has jurisdiction of this appeal under section 241 of the Judicial Code, which is as follows:

> "In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Section 128 of the Judicial Code as amended by the Act of January 28, 1915, (38 Stat. 803,) c. 22, sec. 2, enumerates the cases wherein the decrees of the Circuit Court of Appeals are final, and is as follows:

> "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

Sections 239 and 240 relate to certificates by the Circuit Court of Appeals and to certiorari.

The jurisdiction in the case at bar was not based upon diversity of citizenship, nor was the case one which arose under the laws enumerated in section 128, and consequently the case is not one wherein the decree of the Circuit Court of Appeals is final. The jurisdiction was based upon the undisputed facts set

forth in the bill of complaint, that the defendant was a citizen of the United States and that the matter involved exceeded $1000.

The Act of April 12, 1900, c. 191, sec. 34, 31 Stat. 84, created the District Court of the United States for the District of Porto Rico, with the "ordinary jurisdiction of district courts of the United States," as well as "jurisdiction of all cases cognizant in the circuit courts of the United States."

Under the Act of August 13, 1888, c. 866, sec. 1, 25 Stat. 433, in force at the enactment of the statute above referred to, the Circuit Courts of the United States had jurisdiction of controversies "between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs," the sum or value of $2000.

The local conditions of Porto Rico required that the jurisdiction of the United States District Court of Porto Rico should be extended to certain controversies wherein diversity of state citizenship did not exist, including any controversy involving $1000 to which a citizen of the United States was a party, regardless of the citizenship of the other party to the suit; and by the Act of March 2, 1901, c. 812, sec. 3, 31 Stat. 953, it was provided that—

> "the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Cases between citizens of Porto Rico not arising under the Federal laws were thus left outside, and cases to which a citizen of the United States or a subject of a foreign state is a party were brought within, the jurisdiction of the District Court.

The present suit is one between a corporation created by the laws of Porto Rico and a citizen of that territory—

Martinez v. *La Asociacion De Senoras*, 213 U.S. 20—

and a citizen of the United States resident in Porto Rico. This controversy, therefore, is not between citizens of different states, because a citizen of a territory is not a citizen of a state and diversity of citizenship in the statutory sense does not exist.

New Orleans v. *Winter*, 1 Wheat. 91.
Downes v. *Bidwell*, 182 U.S. 244, 259.

It follows that the decree of the Circuit Court of Appeals was not final because the jurisdiction in the present case was not "dependent entirely upon the *opposite* parties to the suit or controversy being aliens and citizens of the United States or citizens of different states" (sec. 128), but existed under the Act of March 2, 1901, merely by virtue of the amount involved and the fact that the defendant was a citizen of the United States, the plaintiff being a citizen of Porto Rico—

Martinez v. *La Asociacion De Senoras, supra;*
Barrow Steamship Co. v. *Kane*, 170 U.S. 100—

and neither a citizen of a foreign country—

De Lima v. *Bidwell*, 182 U.S. 1;
Porto Rico v. *Castillo*, 227 U.S. 270—

nor a citizen of a state—

Barney v. *Baltimore*, 6 Wall. 280.

Section 241 is so explicit in granting a right of appeal in all cases in which the decree of the Court of Appeals is not made final and section 128 is so definite in the enumeration of those cases in which such appeal is made final that this case, not within that enumeration, is brought within the rule of the Court stated in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, at page 37:

> "'It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott* v. *Reid*, 10 Pet. 524, 527."

To any balancing of reasons there can be made the pertinent query, why should Congress have made final the final decrees of the Circuit Court of Appeals in cases arising under the patent laws or under the trade-mark laws or under the revenue laws or under the criminal laws or in admiralty cases, and have made appealable final decrees arising in cases under the statutes imposing personal liability on the holders of shares in national banks?

Korbly, Receiver, v. *Springfield Institution for Savings*, 245 U.S. 330.

The defendant seeks to avoid the force of the statutes referred to by invoking the decision of this Court

in *Inter-Island Co.* v. *Ward*, 242 U.S. 1. In that case it was decided that a writ of error will not lie from the Supreme Court of the United States to review a judgment of the Circuit Court of Appeals in a case, presenting neither diversity of citizenship nor a Federal question, appealed to that Court from the Supreme Court of Hawaii pursuant to Judicial Code, sec. 246, as amended by the Act of January 28, 1915, c. 22, sec. 2, 38 Stat. 803, upon the basis only of pecuniary amount.

Inasmuch as the case was not one of those enumerated in section 128 wherein the judgment or decree of the Circuit Court of Appeals was made final, the contention was made that under section 241 a writ of error to the Supreme Court of the United States would be maintained, but it was decided that section 241 was not applicable to cases arising in the Supreme Court of Hawaii, that appeals in such cases were not controlled by the laws generally applicable to Courts of the United States and that the intention of section 246 of the Judicial Code as amended by the Act of January 28, 1915, c. 22, sec. 2, 38 Stat. 804, was to restrict the jurisdiction of this Court and not to withdraw jurisdiction by one clause and restore it in whole or in part by another.

For convenience we have quoted, at pages 67 to 72, the more important statutes regulating jurisdiction of appeals from the District Courts and Supreme Courts of Hawaii and Porto Rico.

The Act of March 2, 1917, c. 145, sec. 41, 39 Stat. 965, with reference to the District Court of the United States for Porto Rico, now provides that—

> "Such district court shall have jurisdiction of all cases cognizable in the district courts of the

United States, and shall proceed in the same manner. In addition said district court shall have jurisdiction for the naturalization of aliens and Porto Ricans, and for this purpose residence in Porto Rico shall be counted in the same manner as residence elsewhere in the United States. Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid: Provided, That nothing in this Act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all controversies pending in said court at the date of the approval of this Act."

II.

The Circuit Court of Appeals erred in finding that Monserrat purposely concealed from the defendant the fact that the deed of purchase and sale obligated the defendant to pay the $1700 mortgage, and in finding that the District Court erred in deciding that the defendant was bound to pay the sum called for by that mortgage.

The deed of purchase and sale recited that both the defendant and the said Landron were lawyers (r. p.

30); that the property to be sold was subject to a recorded mortgage to the plaintiff to secure the payment of $4600 with interest at 1 per cent monthly and an additional credit of $500 for indemnities in case of judicial proceedings, and also to a mortgage for the payment of $1700 with interest at a like rate and an additional credit of $200 for like indemnities, which had not yet been recorded (r. pp. 30, 31); that the purchase price was $7832.25, from which was to be deducted the principal of said mortgages, viz., $6300, the payment of which with interest the defendant assumed and agreed to make (r. p. 32).

The District Court judge thus dealt with the issue of fraud presented by the pleadings and the evidence:

> "A good deal of evidence was taken pro and con, that of the plaintiff tending to show that not only was the defendant informed of the existence of this second mortgage but that he distinctly assumed it. On the other hand, the defendant testified himself and has other testimony to the effect that he was not informed of the second mortgage and whatever recitals are contained in the deed to him were not read by him, as he trusted the notary. The case therefore is not without difficulties upon the question of fact. The conclusion of the Court however is that the deeds are the primary source of evidence in the transaction, as in all similar transactions, and must control unless the evidence is very persuasive that there was a mistake or fraud of some kind, affecting the plaintiff bank. The Court cannot say that it is convinced by a preponderance of evidence that such was the case and must therefore be guided by the documents themselves" (r. p. 86).

The application of the above rule as to the burden of proof on the issue in question was more favorable to the defendant than the cases warrant.

In order to set aside, to annul or to correct a written instrument for fraud or mistake, the fraud or mistake must be proven by more than a preponderance of the evidence.

> *United States* v. *Maxwell Land Grant Co.*, 121 U.S. 325, 381.
>
> *Campbell* v. *Improvement Co.*, 229 U.S. 561, 584.
>
> *Atlantic Delaine Co.* v. *James*, 94 U.S. 207, 214.

In *United States* v. *Maxwell Land Grant Co., supra*, in holding that the rule applies *a fortiori* in cases where there is an attempt to set aside, correct or cancel for fraud evidences of title from the United States Government, the Court, by Mr. Justice Miller, say, at page 381:

> "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

In *Atlantic Delaine Co.* v. *James*, *supra*, also a suit to cancel an executed written contract claimed to have been obtained by false representations, the Court, by Mr. Justice Strong, say, at page 214:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved. . . ."

In *Campbell* v. *Improvement Co., supra,* a suit to have a deed absolute on its face decreed to be security only, the Court, by Mr. Justice Pitney, say, at page 584:

> " . . . to justify the setting aside of a solemn instrument of conveyance, deliberately made by parties *sui juris,* and the giving to it of an effect different from its plain purport, the evidence should be clear, unequivocal, and convincing."

It will appear from an examination of the evidence and of the opinion of the Circuit Court of Appeals that that Court failed to appreciate, consider or even mention documentary evidence of the most important character disproving the charges of fraud and demonstrating the defendant's lack of credibility, and further that in arriving at its conclusion the Circuit Court of Appeals acted in utter disregard of the rule requiring importance to be attached to findings of the trial Court which involve the credibility of witnesses who appear before it.

In the case at bar the issue whether the defendant, a lawyer, signed an agreement without reading it and whether a brother lawyer, for the purpose of benefiting a bank to the possible extent of $1700, made the false representations charged was one which peculiarly and justly required the observance of the rule.

It is suitable in this connection, before a review of the evidence, to refer to the language of the Court in *Lytle* v. *State*, 22 How. 193, at page 207:

> "The question of cultivation in May 1830, depended on the parol evidence of witnesses. The judges below knew them. They decided on the spot, with all the localities before them; and as the evidence is contradictory, it would be contrary to precedent . . . to overrule the finding of a mere fact by the courts below."

The rule is not peculiar to the Federal Courts and is thus stated in *Rubenstein* v. *Lottow*, 220 Mass. 156, at page 165:

> "So far as this claim is concerned the defendant has rested upon the familiar doctrine that a decision in equity upon the facts, whether by a judge or a master, will not be overturned unless plainly wrong when it is called in question by a court which has a right to review the finding; as to which see (*inter alia*) *Sawyer* v. *Clark*, 214 Mass. 124, 126; *Campbell* v. *Lima*, 212 Mass. 11; *Flagg* v. *Phillips*, 201 Mass. 216; *Blossom* v. *Negus*, 182 Mass. 515; *Chase* v. *Hubbard*, 153 Mass. 91.
>
> "The foundation of that rule is that where a question of fact depends upon the credit to be given to testimony (including the credibility to be given to the several witnesses), a judge who has seen the witnesses and heard the testimony is better able to come to the correct conclusion than the court which is called upon to review the finding on reading the testimony in print."

The evidence upon the issue here in question was squarely conflicting. The defendant testified that he and his partner were about to advertise the sale of the premises to satisfy a judgment against Landron; that Monserrat came to him with the suggestion that he should take up with Landron the transfer of the property to the defendant in satisfaction of the judgment, and in consequence of the suggestion the three met at Landron's office together with a Mr. Timson, who went there at the defendant's request; that a good deal was said at this conference, and it was finally agreed that the defendant should take a transfer of the property in satisfaction of his judgment of some eighteen hundred dollars, that he should become responsible for the mortgage indebtedness that appeared on the books of the registry as of any date prior to that of the mortgage made by Landron to Sweet and Wilcox on which the judgment had been obtained, that the purchase price which should appear in the deed should be the amount of that judgment; that nothing was said about a mortgage of seventeen hundred dollars ($1700) nor was there anything said to lead him to suspect that there was any other mortgage indebtedness except the mortgage to the bank for $4600, and further that the agreement should be reduced to writing (r. pp. 51, 52).

The defendant further testified that the first time he heard of the existence of a mortgage for $1700 was several weeks after the deed of purchase and sale was executed to him, and, further, that "when I went to sign the deed of sale under which I took over the property in question from Mr. Landron, I took the document which was handed me by Mr. Monserrat

and glanced at the first part of it very hastily. I was in a hurry. The agreement under which it was to be drawn up had been entered into only a day or two before, at which Mr. Monserrat was present, and in the discussion of which he took part, and he assured me on my asking him that it was all right. I asked him if it was drawn up in accordance with the agreement that we had made with Mr. Landron, and he stated to me that it was, and thereupon, without reading the document further, I took the pen which he handed me and signed it. Mr. Landron was not present" (r. p. 51).

There is thus presented the usual flimsy statement of a party dishonestly attempting to evade a written obligation—that he didn't read it because he was in too much of a hurry, and because assured by another that the document was all right. It is important in this connection to note that the defendant is a lawyer and was appreciative of the importance of reading agreements before signing them, and that he fails to disclose any exigency so important as to prevent his utilizing a few seconds in glancing at the subdivision entitled "Liens" in the agreement which recited the existence of the $4600 mortgage, the fact of its record, and the existence of the $1700 mortgage, and the fact that it was not recorded. The Circuit Court of Appeals did not consider these discrediting circumstances as of sufficient importance to either consider or mention.

Moreover, entirely discrediting the defendant's testimony referred to, the defendant under oath, in the third paragraph of his answer filed July 20, 1914, claimed that in fact he did not purchase the property, and that he took the title as part of an arrangement to

sell it and without obligating himself to pay even the $4600 mortgage, alleging that the deed of purchase and sale was made to him "only for the purpose of guaranteeing to defendant and his law partner Willis Sweet a certain sum of money owed them by the said Lopez Landron and at the suggestion and insistence of the plaintiff in this action, through its president, Damian Monserrat y Simo who claimed that said bank had a prior unpaid mortgage on said property, with the understanding that defendant should endeavor to sell the property for a sum that would pay the bank its claim as well as that of defendant and the said Willis Sweet, and the defendant, even with the agreement above stated, denies that he obligated himself at any time to pay the amount due the said bank by Lopez Landron" (r. pp. 5, 6).

In his cross-bill, also under oath, filed the same day defendant alleged that "cross complainant agreed to take over the said property not as the real owner of the same nor to become responsible for the payment of the *debts* of the said Landron with which said property was charged, holding priority over his mortgage and that of Willis Sweet, but rather as an *agent* to sell the same with the assistance of the said bank in order that the amount might be realized sufficient to pay off the bank's prior mortgage and that of Sweet and Wilcox" (r. p. 8).

On July 5, 1916, the defendant, varying his oath by the exigencies of his case, and admitting only a portion of the truth, admits his lack of credibility in the past by alleging, with reference to the oral agreement, "that an agreement was made to the effect that this defendant would assume the payment of the said mort-

gage for the sum of $4600 and cancel his said judgment and decree and that the said Landron for himself and wife agreed to deed said property . . . to defendant; the consideration being the assumption of said debt of $4600 besides the interest and full satisfaction of his own debt" (r. p. 18).

This documentary proof of the defendant's lack of credibility in the opinion of the Circuit Court of Appeals was unworthy of consideration or even mention. The fact that the amended answer was the result of and followed the order of the Court dismissing the answer for insufficiency entered January 28, 1916, is not without significance as showing that the defendant's oath and recollection varied with his needs, and are not dependable.

The defendant's testimony is further discredited by the fact that he paid on August 9, 1913 (r. p. 50), $252, four months' interest on the mortgages from December 3, 1912, to April 3, 1913, at the rate reserved by the mortgages, 1 per cent per month (r. pp. 80, 81, 83, 84). The interest on $4600 for the same time would be $184. The payment appears on the books of the bank (r. p. 49) and the treasurer testified that "Mr. Wilcox paid the sum of $252 as interest on the sum of $6300 for four months, for which a receipt was issued to him. No interest has since been paid" (r. p. 50).

The defendant admits making the payment, does not remember the date, admits receiving the bill for the interest, and says "when the bill for the interest was sent to me it seemed to me that it was very high. I concluded that Mr. Landron must have left several quarters of interest unpaid and the bank was trying to collect some of his unpaid interest out of me. How-

ever, I decided to look the matter up carefully, which I did, and ascertained then for the first time that there was a purported mortgage for Seventeen Hundred Dollars ($1700), and after that I refused to pay any further interest." He testifies that this payment was made "within a month or so after" January 14, 1913 (r. p. 53).

This shady explanation is completely disproved by the fact that, although a lawyer, he made no demand for reformation or cancellation of the deed and brought no suit, but waited until a bill to foreclose was brought June 9, 1914, and then by answer under oath set up the claim that the deed at the suggestion of Monserrat "was only made for the purpose of guaranteeing to defendant and Sweet" the amount of their judgment, with the understanding that defendant should endeavor to sell the property for the benefit of both plaintiff and defendant, and denying that defendant "obligated himself at any time to pay the amount due the said bank by Lopez Landron" (r. pp. 5, 6), and alleging that "said sale was made with the consent and at the suggestion of said plaintiff only for the purpose above stated" (r. p. 6).

It is further significant that the defendant could not have concluded that Landron had left "several quarters of interest unpaid," because two unpaid quarters of interest on the mortgage of $4600 would have been $368, and, further, the receipt he took was for "the sum of $252 as interest on the sum of $6300 for four months" (r. p. 50). This payment of interest in accordance with the terms of the deed of purchase and sale, supported by documentary evidence and met only by the statement of a lawyer whose credibility is dis-

proved by his written affidavits, was not in the opinion of the Circuit Court of Appeals worthy of consideration or mention.

Furthermore, on the 13th day of January, 1913, the day before the deed of purchase and sale was executed, the defendant and Wilcox executed an agreement which was drawn by the defendant, whereby Landron contracted to sell the premises to the defendant in consideration of the cancelling of the judgment in favor of the defendant and Sweet, and which recited that "It is further agreed that the said Wilcox shall assume the *encumbrances* now existing against said property which are duly registered in the Registry of Property which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet and Wilcox" (r. pp. 52, 53).

The mortgage of $1700 was dated December 3, 1912 (r. p. 83); the mortgage to the defendant and Sweet was dated June 12, 1912 (r. p. 27). The defendant admits that he never showed this agreement to Mr. Monserrat (r. p. 54), and Mr. Monserrat testified that he was not present when it was drawn and that he never saw it before the trial of the case (r. p. 58).

The agreement of Wilcox to assume "the encumbrances now existing against the said property" expresses the understanding of the parties that there was more than one encumbrance, and the only encumbrances disclosed by the evidence are the two mortgages to the bank. The description of the encumbrances assumed by the defendant as those "which are duly registered in the Registry of Property which bear a date prior to that of the mortgage" given to the de-

fendant and Sweet, is due to the fact that Landron understood that these mortgages were recorded (r. p. 61), and Wilcox, who drafted the agreement, presumably got his information from Landron. The natural infirmity of the defendant's recollection is indicated by his testimony that this agreement refers to the first mortgage and states the *amount* (r. p. 55).

A little later in the argument we will point out the great disproportionate importance which the Circuit Court of Appeals attached to the agreement of January 13th and the action of the District Court with reference to it.

One Timpson, a witness called by the defendant, testified that he was present at a conference in Landron's office between the defendant, Monserrat and Landron; that he understood Spanish better than English; that some of the conversation was in English; that he knew what his impression was of what occurred that day, but whether he got the entire facts that day or a few days afterwards he was unable to say; that it may have been that he got some information at the office and the rest of it from Mr. Wilcox upon returning to his office; that it was his recollection that the agreement referred to a mortgage for $4600 or $4700 (r. p. 56); and on cross-examination he testified that he was not certain he heard the amount mentioned at the conference or at the office of Wilcox after he returned to it; that he did not pay much attention to the conversation at the office of Mr. Landron; that there were two or three people there; that he got the impression at that time and afterwards that what appears in the agreement of January 13th was what was agreed upon at the office, and that at the office he understood the amount was $4700 and

doesn't recall hearing any amounts other than $4600 or $4700 mentioned (r. p. 57).

The testimony of this witness was too vague and indefinite to be of any value.

Mr. Monserrat testified that he did not recall having been present at Mr. Landron's office with the defendant, Landron and Timpson; that the deed of purchase and sale was drawn in accordance with instructions which the defendant gave him and which he noted at the time; that he drew up the document accordingly to be executed on the following day; that the defendant executed the agreement on the following day after reading it and stating that it was all right; that many times the defendant came to the witness and asked that the bank should wait for the interest; that the defendant did not pay the taxes, although he collected and did not account for the rent; that the defendant was furnished with a copy of the deed and the defendant admitted receiving it (r. pp. 58, 59), and never made any complaint with regard to the $1700 mortgage, but on the contrary expressed gratitude for the accommodation which the bank gave him in the payment of interest (r. pp. 58, 59). The witness also testified that after the defendant read the deed the witness read it to the witnesses to the deed and to Wilcox (r. p. 60).

Landron, a witness called for the plaintiff, testified that the house had more than thirty-one apartments or rooms; that he told the defendant the house was worth more than $13,000 and that it was assessed in the treasury department at $13,000 (r. p. 61); and further that the mortgage for $1700 was made up largely of arrears of interest due and unpaid on the mortgage for $4600,

but a part of it was additional loans (r. p. 61). The witness further testified that the agreement with the defendant was that the defendant took the property subject to both mortgages to the bank in settlement of the claim of Sweet and Wilcox against the witness (r. pp. 60, 61). The defendant being recalled testified that "the estimate of the value of the property placed upon it by Mr. Landron is too high I would say, judging from what I have been offered for the property" (r. p. 63).

The Circuit Court of Appeals attaches no importance to the improbability that the defendant executed the agreement without reading it, no importance to his assertion under oath in his original answer and cross-bill that he took over the property merely as an agent to sell the same without becoming obligated to pay to the bank other than from the proceeds of the sale, no importance to the fact that he made a payment to the bank of the exact amount of the four months' interest on both mortgages in accordance with the deed of sale, no importance to the fact that his explanation of the reason for making this payment is inconsistent with any view of the situation which could be taken, no importance to the fact that his claim of fraud is discredited by the absence of any action on his part to have the deed rescinded or his obligation avoided after learning, as he claimed, of the fraud which had been perpetrated on him, and no importance to the fact that the agreement which he himself drew up with Landron on January 13th indicated that more than one mortgage was assumed by the defendant, and arrives at its conclusion without indicating the slightest appreciation of the significance which the law justly attaches to the execution by a person *sui juris* of a written agreement,

and the weight which an appellate court is justly bound to give to the decision of a trial Court conversant with local conditions and environment and having some acquaintance with and knowledge of the members of the bar who were witnesses before them. The reasoning in the opinion of the Circuit Court of Appeals is fallacious. In the opinion, at page 96, the Court says:

> "The plaintiff did not call the witnesses to the deed to testify but did call Landron, who testified that while he remembered that Wilcox came to his office to talk about the settlement he did not remember that Monserrat, Senior, was there with him at that time; that he signed the document that had been agreed upon, drawn up, as he supposed, by Wilcox and brought to him by an American whose name he did not know but who used to attend to some business for Wilcox. His testimony was inaccurate and confused as to the details of the different transactions and he gave no testimony as to whether at the time the deed was signed it was read over by Wilcox or by Monserrat, Senior, the notary, in the presence of Wilcox."

It is pertinent to reply that the witnesses to the deed were witnesses to it in its entirety, to the parts imposing obligations upon Landron as well as to the parts imposing obligations on the defendant. "The plaintiff did not call the witnesses to the deed to testify," *but neither did the defendant.* "Landron's testimony was inaccurate and confused as to the details of the different transactions." We challenge this statement *in toto.* A reading of that testimony at pages 60 and 61 confirms the statement of the witness that he remem-

bered "the main features of the transaction but not the minor details, which on account of the lapse of time I am not able to recollect. I paid the debt by giving Mr. Wilcox the house and he assumed charge of the mortgages. The property was subject to the mortgages which had been constituted thereon by me, one first mortgage for $4600, to the best of my recollection, which had been standing for some years back. . . . I gave the second mortgage to the bank of $1700. a long time before the deal with Wilcox. . . . Made up largely of arrears of interest unpaid and due on the mortgage of $4600. A part of the $1700. was taken in money the exact amount of which I do not remember" (r. pp. 60, 61).

The witness proceeds to state a recollection almost positive that the defendant came to his office twice to talk about the matter, saying that after four years it is impossible to remember whether once or twice (r. p. 61). The witness agreed either with Mr. Wilcox or Mr. Pettingill to give the house to the defendant in payment of what he owed him, Wilcox to assume the mortgages for $4600 and $1700, and understood that both of those mortgages had been recorded. The witness testified that the property was assessed at $13,000; that he told the defendant that it was worth more than $13,000; that it had more than thirty-one apartments or rooms, and that the witness had spent therein a large fortune (r. p. 61).

It was the testimony of Frederic C. Timpson, a witness called by the defendant, on page 56 of the record, which was inaccurate, confused and merely a repetition of self-serving statements of the defendant made in the absence of the plaintiff and of Monserrat.

The Circuit Court of Appeals then says, at page 96:

> "The written memorandum of January 13, 1913, was offered in evidence by the defendant and was excluded subject to exception, but was permitted to be read. Why this document was excluded and why its contents were permitted to be read into the record is not entirely clear. It surely was competent evidence to be considered together with other proof upon the question of fraud. Whether any weight was given to it as evidence we have no way of ascertaining. The reasonable conclusion would seem to be that, having excluded it, the court gave it no weight but allowed it to be read into the record to show the nature of the agreement in case its exclusion might subsequently be brought in question."

A reference to Equity Rule 46 and to *Blease* v. *Garlington*, 92 U.S. 1, will make it entirely clear why the contents of the memorandum of January 13, 1913, was read into the record although the document itself was excluded. Probably the District Court excluded the document on the ground that it was so ambiguous as to be of little value in dealing with the credibility of the witnesses. It certainly did not affect the credibility of Monserrat, because, as testified by Monserrat as well as by the defendant, it had never been called to his attention (r. pp. 54, 58).

The Circuit Court of Appeals, however, proceeds as follows, on page 96:

> "It was an important piece of testimony upon the question of fraud and should have been received. It showed that Wilcox had agreed with

> Landron to assume the mortgage given to the bank which was duly registered and bore a date prior to the defendant's mortgage, and that Landron, in case he did not repurchase the property, was to pay as rental, for the time he occupied the premises, the amount of the interest upon the mortgage held by the bank. That this was their agreement seems to be clearly established."

On the contrary, it shows that the defendant had agreed with Landron to assume more than one mortgage and the description of the mortgages assumed as those given and recorded prior to the defendant's mortgage was a mistaken one. Landron testifies that the defendant orally agreed to assume both mortgages (r. pp. 60, 61), Monserrat testifies that he was so instructed by the defendant (r. p. 58), and the defendant then drafts the agreement of January 13th, intended, as he now admits, to bind him to assume at least one of the mortgages, and refers to them as "encumbrances now existing against the said property," following with a description applicable to one and inapplicable to the other (r. p. 53).

The Circuit Court of Appeals then proceeds, at pages 96 and 97:

> "And the question is, if we assume that Monserrat, as he testified, received his information as to the terms of the agreement from Wilcox, whether it is reasonably probable that Wilcox, having made the agreement that he did with Landron, could have told Monserrat that he had agreed to assume, not only the $4600 mortgage held by the bank, but also the $1700 mortgage, or that he

read the deed or the provision in it binding him to pay the $1700 mortgage, or that the deed was read to him by Monserrat. What was he to gain by entering into such a transaction? He held a mortgage upon the property that ante-dated the $1700 mortgage, upon which he had obtained a judgment of foreclosure and the property had been advertised for sale on the fifth of the following month, when the equity of Landron would be extinguished. He stood to lose, not to gain, by making such an agreement, and the reasonable inference is that he did not do so."

A more careful analysis of the evidence would have led the Circuit Court to propound different questions and to a different result. Is it reasonable to assume that Landron agreed to sell a property assessed at a valuation of $13,000, and which he believed to be worth more than $13,000, for the amount of the $4600 mortgage held by the bank and for the judgment claim of less than $1800 without any release from his liability on the $1700 mortgage? What was he to gain by entering into such a transaction? Such a transaction on his part was certain loss. Landron testifies that in his opinion the property was worth more than $13,000 (r. p. 61). Wilcox testifies that in his opinion it was worth less (r. p. 62). The value of the property, then, according to the test applied by the Circuit Court of Appeals, was the basis of its decision, and if that be so, turned on the credibility of Landron. The defendant, however, unlike Landron, did have a chance to gain, because he got an absolute title to this property at a cost of $7832.25 under the deed of purchase and sale (r. p. 32).

The Circuit Court of Appeals then proceeds to deal with the motives of Monserrat in a manner which would indicate that the burden of proving fraud and the presumption of innocence is in this case a matter of negligible importance:

> "But the interest of Monserrat, Senior, in the transaction was quite different. He was the president of the bank that held the $1700 mortgage; he had been largely instrumental in making the loan from the bank to Landron, and he was individually interested in the welfare of the bank, being a stockholder in it; and it seems to us that the evidence, when taken as a whole, demonstrates that he purposely concealed from Wilcox the fact that the deed obligated him to pay the $1700 mortgage, and that the court below erred in finding that Wilcox was responsible for and bound to pay the sum called for by that mortgage" (r. p. 97).

But Monserrat had only an indirect and very slight pecuniary interest as a stockholder. And Wilcox had a direct personal interest for the full amount involved.

There was not in the case a particle of evidence that Monserrat had been largely instrumental in making the loan to Landron. Because Monserrat was the president of the bank that held the mortgage for $1700, and had stock in the bank, the Circuit Court of Appeals jumps to the conclusion that the evidence taken as a whole demonstrates that he purposely concealed from the defendant the fact that the deed obligated him to pay that mortgage.

III.

The Circuit Court of Appeals erred in ruling that the deed of purchase and sale was a nullity on the ground that Monserrat, the notary who authorized the same, was disqualified to act by reason of his official relation to the plaintiff and his interest as a stockholder.

Section 20 of the Notarial Law of Porto Rico of March 8, 1906 (section 1998 of the Compilation of 1911), provides as follows:

> "The following public instruments shall be null and void;
>
> "First. Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.
>
> "Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument are witnesses thereto."

Mr. Monserrat, the notary who authorized the deed of purchase and sale, was the president of the plaintiff and a stockholder (r. p. 50).

The deed from Landron to the defendant recites that the property is subject to the $4600 and $1700 mortgages to the plaintiff (r. pp. 30, 31), and contains the provisions (r. pp. 31, 32):

> "Fifth. The parties hereto further set forth, that having entered into an agreement for the purchase and sale of the above mentioned property, they carry the same into effect, subject to the following conditions.
>
> "First. Don Rafael Lopez Landron, acting in

his own behalf and as attorney in fact for his wife Dona Ana Maria Gutierrez e Igaravidez, makes sale unto Mr. Elias B. Wilcox, the purchaser herein, of the property described in clause number one of the Statement, which sale is made in consideration of the sum of Seven thousand eight hundred and thirty two dollars and twenty five cents.

"Second. From the sum of Seven thousand eight hundred and thirty two dollars and twenty five cents, which is the purchase price, there is deducted the sum of Six thousand and three hundred dollars, which make up the capitals guaranteed by the two mortgages in favor of the Banco Popular de Economias y Prestamos, declared in clause number three of the Statement; and the purchaser binds himself to make payment of said capitals, and interest, guaranteed by said mortgages, as well as to comply with all its obligations, principal and accessory.

. . . . . .

"Fifth. The purchaser Mr. Elias B. Wilcox, as an interested party in the facts recited in clause number four of the Statement, recognizes that the same are true, and binds himself to answer to Don Rafael Lopez Landron, for any damage which he may suffer by reason of any claim arising from the mortgage constituted to guaranty the promissory notes to the order of Messrs. Sweet and Wilcox, on account of said promissory notes; for Mr. Elias B. Wilcox, the purchaser herein, takes charge of the total cancellation of said mortgage and its obligations."

The Circuit Court of Appeals deals with this question as follows in its opinion, at pages 97 and 98 of the record:

> "The plaintiff contends that it acquired no interest whatsoever under the deed by Wilcox's assumption of the mortgage indebtedness for $4600, or by his assumption of the mortgage for $1700, even if that was not brought about through fraud; and that it could at any time foreclose the mortgages either against Wilcox or Landron, as the 'right of action was always against the property and not against the person.' But this contention loses sight of the fact that, in this proceeding, the bank is not seeking simply to foreclose the rights of Wilcox in the property, but to charge him with the obligation to pay the indebtedness secured by the mortgages, and that its right to do so depends upon the validity of the deed and the provisions contained therein as to Wilcox's assumption of the indebtedness secured by the mortgages (*Ayers* v. *Wiswell*, 112 U. S. 187; *Willard* v. *Wood*, 135 U. S. 309; *Keller* v. *Ashford*, 133 U. S. 610; *Union Life Ins. Co.* v. *Hanaford*, 143 U. S. 187, 190; *Garnsey* v. *Rogers*, 47 N. Y. 233, 241), and that the bill of complaint alleges the assumption of these obligations as a ground for effecting this result. We are therefore of the opinion that the bank, if the deed was valid, would acquire an interest in Wilcox's assumption of the $4600 mortgage, and the question is whether Monserrat, Senior, the notary, by reason of his being the chief executive officer of the bank and a substantial stockholder, had such an interest as would dis-

qualify him from acting as notary in the transaction within the meaning of the Notarial Law above quoted.

"While the provisions of this law are old, being taken from the Spanish Notarial Law, no decisions of the Spanish courts construing them have been called to our attention, and it is asserted by counsel that none are to be found, for the reason that under the Notarial Law of Spain a notary could not take part in his notarial district in the administration of a bank of discount, or a brokerage establishment or any commercial or industrial company, and that a notary, not being permitted to be an executive of a bank, no occasion for a construction of the law has arisen.

"The provision of law prohibiting a notary from taking part in the administration of a bank in his notarial district is not now in force in Porto Rico, but inasmuch as it was embodied in the old Notarial Law of the Island of which Section 20 was a part, it would seem that it might be availed of in ascertaining the meaning of the section. But, however this may be, we think that Section 20 is capable of but one of two constructions; that either it means that a deed should be void if the notary before whom it was acknowledged had any interest in the transaction, however slight, or that it should be void only in case is was made to appear as a fact that his interest was sufficiently large to cause him to be biased. Opinion of the Justices, 75 N. H. 313, and cases there cited. And on either construction it seems to us the defendant must prevail, for we are of the opinion that, in-

asmuch as the notary was the president and a substantial stockholder in the bank, he had a material interest in the transaction which would disqualify him to act as notary and that the deed is a nullity."

It is submitted that in deciding this question the Court of Appeals has strayed far from the provisions of the statute under consideration.

It is a familiar rule of statutory construction that where a statute enumerates the things upon which it is to operate or forbids certain things, it is to be construed as excluding from its operation and effect all those not expressly mentioned.

> "*Expressio unius est exclusio alterius* is a universal maxim in the construction of statutes."
>
> *United States* v. *Arredondo*, 6 Peters, 691, at 725.

The question is not, as the Court of Appeals would seem to infer at pages 97 and 98 of the record, whether the bank by subrogation could enforce the defendant's obligation to Landron to pay the mortgages and whether the notary was interested in the bank either as chief executive officer or stockholder, but is whether the instrument was one "in which the notary authorizing the same has intervened as a party thereto, or which contains any provision in his favor."

The instrument in question was not one in which Monserrat or even the plaintiff bank had intervened as a party thereto nor did the deed contain any provision in favor of either of them.

The contract of a purchaser to pay the mortgage, contained in the mortgagor's deed to him, creates no

direct obligation of the purchaser to the mortgagee, and the right of the mortgagee to enforce payment of the mortgage debt against the grantee does not rest upon any contract of the grantee with the mortgagee or with the mortgagor for the benefit of the mortgagee.

Keller v. *Ashford,* 133 U.S. 610.
Bank v. *Grand Lodge,* 98 U.S. 123.
Life Ins. Co. v. *Hanford,* 143 U.S. 187.
Willard v. *Wood,* 135 U.S. 309.

In *Keller* v. *Ashford, supra,* in holding that in equity, as at law, such a contract by the purchaser to pay the mortgage creates no direct obligation from the purchaser to the mortgagee, but that the mortgagee may avail himself of the right of the mortgagor against the purchaser upon the principle that in order to avoid circuity of action a creditor may in equity have the benefit of any obligation given by the principal to the surety, the Court say, at page 621:

> "In the case at bar, the promise of Ashford was to Thompson and not to the mortgagees, and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.
>
> "In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the

mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee.''

And at page 624:

"'The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.

"'The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys so paid.

"'In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors.'"

In *Insurance Co.* v. *Hanford, supra,* the Court, by Mr. Justice Gray, say, at page 189:

"All agree that the grantee is liable to the grantor, and that, as between them, the grantee is the principal and the grantor is the surety for the payment of the mortgage debt. The chief diver-

sity of opinion has been upon the question whether the grantee does or does not assume any direct liability to the mortgagee.

"By the settled law of this court, the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. *Keller* v. *Ashford*, 133 U.S. 610; *Willard* v. *Wood*, 135 U.S. 309."

Coney v. *Winchell*, 116 U.S. 227, cited by the Court of Appeals (r. p. 94), is not authority for the proposition that the deed to the defendant created any contract between him and the plaintiff, or contained any provision in plaintiff's favor within the meaning of section 20—much less any provision in favor of its president or any or all of its shareholders.

Even if it be assumed that the deed contained a provision in favor of the bank, the Court of Appeals erred in holding that the case came within the operation of the statute on the ground that the statute meant "either that a deed should be void if the Notary before whom it was acknowledged had any interest in the matter however slight, or that it should be void only in case it was made to appear as a fact that his interest was sufficiently large to cause him to be biased" (r. p. 98).

While it is true that there are authorities to the effect that in the absence of a controlling statute a stockholder of a corporation is disqualified to take an

acknowledgment of an instrument to which the corporation is a party—

Ogden Building &c. Ass. v. *Mensh*, 196 Ill. 554;
Wilson v. *Griess*, 64 Neb. 792;
Bank v. *Bank*, 11 Wyo. 32;
Hayes v. *Southern Ass.*, 124 Ala. 663;
Southern Iron & Equipment Co. v. *Voyles*, 138 Ga. 258—

cases to the contrary are not lacking:

Read v. *Loan Co.*, 68 Ohio St. 280;
Cooper v. *Hamilton Building Co.*, 97 Tenn. 285;
Guaranty Co. v. *Lawrence*, 32 Wash. 572;
Babbitt v. *Bank*, 50 Colo. 258—

and the present situation is clearly not within the plain and explicit provisions of the Code.

It is well settled under the decisions in the various states that the fact that an officer of a corporation takes the acknowledgment of a corporate instrument will not render the acknowledgment void.

Bank v. *Rivers*, 36 Fla. 575.
Bank v. *Oberhaus*, 125 Cal. 320.
Bardsley v. *Bank*, 113 Iowa, 216.
Castetter v. *Stewart*, 70 Neb. 815.

Even if it be assumed that Monserrat was disqualified to authorize the deed by section 20, the deed was not thereby rendered a nullity as between the parties and the defendant became the owner of the property.

The Civil Code of Porto Rico contains the following provisions:

> Sec. 1184 (R.S. sec. 1184): "Public instruments are those authenticated by a notary or by a competent public official with the formalities required by law."
>
> Sec. 1191 (R.S. sec. 4297): "An instrument which is defective by reason of the incompetency of the notary or by reason of any other fault in its form shall be considered as a private instrument when signed by the parties who executed the same."
>
> Sec. 1193 (R.S. sec. 4299): "A private instrument legally acknowledged shall have with regard to those who signed it and their legal representatives, the same force as a public instrument."

(See page 43)

It is apparent from the above that the only effect of the incompetency of Monserrat as a notary would be to make the deed merely a private instrument effective as between Landron and defendant. As a private instrument the following sections excluded it from registration and rendered it ineffective to *prejudice* third parties.

Mortgage Law, art. 2 (R.S. sec. 6686):

> "The following shall be recorded in the registries mentioned in the preceding article.
>
> "First. Deeds conveying or declaring the ownership of real property or of property rights therein.
>
> "Second. Instruments constituting, recognizing, modifying or extinguishing rights of usufruct, use,

habitation, emphyteusis, mortgages, rent charges, servitudes or other real rights.

"Third. Acts or contracts under which real property or real rights are conveyed to a person. . . ."

Art. 3 (R.S. sec. 6687):

"In order to permit the record of the instruments mentioned in the foregoing article they must be embodied in a public instrument, final judgment or authentic document issued by a judicial authority, or by the Government or its agents in the form prescribed in the regulations."

Art. 23 (R.S. sec. 6707):

"The instruments mentioned in Articles 2 and 5 which are not duly recorded or entered in the registry cannot prejudice third persons."

This is emphasized by other sections of the Code:

Sec. 1221 (R.S. 4327): "A contract exists from the moment one or more persons consent to bind himself or themselves, with regard to another or others, to give something or to render some service."

Sec. 1225 (R.S. 4331): "Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use and law."

Sec. 1228 (R.S. 4334): "There is no contract unless the following requisites exist: (1) the consent of the contracting parties; (2) a definite object which may be the subject of the contract; (3) the cause for the obligation which may be established."

(The above section is contained in Chapter 2 of the Civil Code which is entitled, "Essential Requisites for the Validity of Contracts.")

Sec. 1245 (R.S. 4351): "Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist."

Sec. 1246 (R.S. 4352): "Should the law require the execution of an instrument or other special formality in order to make the obligations of a contract binding, the contracting parties may compel each other to comply with said formalities from the moment in which consent and the requirements, necessary for their validity, have taken place."

Under the above provisions of the Code it is held that contracts and transactions, the requisites for the validity of which exist under section 1228, are enforceable and valid, notwithstanding the fact that they are not embodied in public instruments.

Vazquez v. *Medina*, 17 P.R.R. 96, at 99.
Rio v. *Vazquez*, 17 P.R.R. 644.
Cintron v. *Fernandez*, 22 P.R.R. 450.

In *Cintron* v. *Fernandez, supra*, under section 1247 (R.S. 4353) providing that "The following must appear in a public instrument, (1) acts and contracts,

the object of which is the creation, transmission, modification or extinction of property rights on real property," it was claimed that a contract could not be enforced until the public instrument had been executed either voluntarily or by a Court order, but the Court held it was not necessary that an action to enforce compliance with the formalities should precede the action on the contract.

The Court say, at page 454:

"In a judgment of July 4, 1899, the Supreme Court of Spain said:

"'The effectiveness of contracts between contracting parties depends exclusively upon their validity by virtue of the existence of the essential conditions and not upon the extrinsic formalities required by law for other different purposes, therefore the parties may compel each other reciprocally to comply with the contracted obligations. Article 1279 of the said Code (section 1246 of the Revised Civil Code) ratifies that rule of law, because, foreseeing the probability that the law would require the execution of an instrument or other special formality in order that the obligations of a contract may be made effective, at all events by the party in whose favor they may have been undertaken, it does not subordinate the effectiveness of the contract to the existence of that extrinsic formality, but, on the contrary, considers principally its validity in prescribing that in such a case the contracting parties, apart from the obligations contracted, are obliged to comply with that external formality or solemnity. *This does not permit of the contention that it would be lawful for the obligor to contravene the contracted*

obligations by his acts or even that an action to enforce compliance with the formalities must precede an action arising from the contract.' "

In *Rio* v. *Vazquez, supra,* the Court say, at page 651:

"The consideration of the evidence made by the trial court having been accepted, section 1228 of the Civil Code could not have been violated by said judgment, since all the requisites essential to the validity thereof appeared in the agreement which was made between the plaintiff and the defendant in regard to the manner of satisfying the debt, to wit, the consent of the parties, the true object of the contract, and the cause of the obligation, it being unnecessary in order to make it valid that the same be stated in a public document, inasmuch as according to section 1245 contracts are binding whatever may be the form in which they may have been executed, provided the essential conditions for their validity exist."

From the foregoing it is apparent that even though the deed may not have been effective as a public instrument, it was effective as between the parties, and the defendant became the owner of the property.

IV.

The Circuit Court of Appeals erred in deciding that the deed of purchase and sale was null and void and the provisions thereof unenforceable on the ground that the witnesses to the same were the clerks or servants of Monserrat, the notary authorizing the same.

The bill of complaint recited the execution of the $4600 and $1700 mortgages from Landron to the bank

and the deed from Landron to defendant, "who assumed said debts and confessed in the said deed his obligation to pay the mortgage liens imposed on the property" (r. p. 4). It then stated the amount claimed to be due. It did not waive answer under oath but called upon defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated and he was therein especially interrogated (r. p. 4).

The defendant's answer, which was under oath, after answering specifically various allegations of the bill, proceeds as follows:

> "And your orator further submits as a fact constituting a violation of law well known to the said Monserrat and to the said Landron, that at the time said Monserrat acknowledged said bill of sale or deed as a notary public the said Monserrat was the president of the Banco Popular and a heavy stockholder therein and its legal representative, and that the witnesses to the execution of said instrument were in his employ, all of which your orator submits is in violation of the law of Porto Rico; and your orator submits whether said acknowledgment does not under said law make such instrument null and void" (r. pp. 19, 20).

The plaintiff offered no evidence in denial of the above allegations and the defendant offered no evidence in support thereof. The Circuit Court of Appeals held that the above allegations of the answer must be taken as true, and that the deed was null and void for the reason that the witnesses were the clerks or servants of the notary, dealing with the question as follows, at page 98 of the record:

"In the amended answer, which was under oath, the defendant has alleged as a fact that the witnesses to the execution of the deed were in the employ of Monserrat, the notary. The Bill of Complaint did not waive an answer under oath, and called upon the defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated and he was therein especially interrogated. The plaintiff offered no evidence whatever in denial of those allegations. It is a rule in chancery practice that, when an answer is under oath, such parts of it as are responsive to the bill are evidence equal to the testimony of one credible witness and are, therefore, to be taken as true, unless outweighed by a preponderance of evidence. Kennedy v. Custer, 147 Fed. 972; Jacobs v. Van Sickle, 127 Fed. 62; Campbell v. Northwest Eckington Co., 229 U.S. 561, 574, 579; Vigel v. Hopp, 104 U.S. 441; Clark's Executors v. Van Riemsdyke, 13 U.S. 153, 160; 1 Whitehouse Eq. Pr. Sec. 282."

But that portion of the answer did not expressly negative, nor was it directly responsive to any allegation in the bill and therefore was not evidence in favor of the defendant. The rule is that those portions of an answer under oath which expressly negative and are directly responsive to allegations in the bill are evidence in favor of the defendant, but that averments in the answer not directly responsive to such allegations are not evidence for the defendant, because the plaintiff has not called for them.

Seitz v. *Mitchell*, 94 U.S. 580.

New England Bank v. *Lewis*, 8 Pick. 113.
Bellows v. *Stone*, 18 N.H. 465.
Daniell's Chancery Practice, vol. 1, 844.

In *Seitz* v. *Mitchell*, *supra*, the bill charged that the defendant had conspired with his wife to hinder plaintiff creditor by procuring a deed of land which he purchased to be made to his wife; that the purchase money was paid by defendant from his own funds, and a deed of trust given by the wife to a third person to secure the balance of the purchase money, which deed was subsequently released by the third person to the wife. The answer denied that defendant purchased the property or paid for it or advanced money to pay for it, and denied all fraud, and further averred that the wife in her own name and for her sole and separate property purchased the land and took the deed in her own name and paid the purchase money. With regard to the effect of the answer as evidence for the defendant, the Court, by Strong, J., say, at page 82:

"The general rule of equity practice is, that when a defendant has, by his answer under oath, expressly negatived the allegations of the bill, and the testimony of one person only has affirmed what has been negatived, the court will not decree in favor of the complainant. There is then oath against oath. In such cases there must be two witnesses, or one with corroborating circumstances, to overbear the defendant's sworn answer. The reason for this is, that the complainant generally calls upon the defendant to answer on oath; and he is, therefore, bound to admit the answer, so far as he has called for it, to be *prima facie* true, and

as worthy of credit as the testimony of any other witness. This rule, however, does not extend to averments in the answer not directly responsive to the allegations of the bill, for the complainant has not called for them. It is always to be considered, therefore, when the rule is attempted to be applied, how far the averments of the answer are responsive to what is alleged in the bill. In the case before us, the defendant's answer denies that George Seitz purchased the Kendall lot, or paid for the same, or owned or advanced any money to pay for the same. So far it is responsive to the complainant's allegations. But the answer furnishes no evidence that the wife had any separate property, or any means or money of her own with which to pay the purchase-money of the lot conveyed to her."

In *New England Bank* v. *Lewis*, 8 Pick. 113, the bill alleged that the plaintiffs gave defendants notice that they were desirous of availing themselves of certain trusts in their favor and were ready and anxious to execute the trust deed. The answer alleged that the president of the plaintiffs called upon the defendant, saw the deed of trust and declined to execute it. In holding that this allegation of the answer was not evidence for the defendants, the Court say, at page 119:

"The question for the defendants to answer was whether the plaintiffs did offer to execute the trust deed; and a simple affirmative or negative would have been the proper answer. But if the defendants saw fit to go further, as they had the right to do, and aver additional matter on which they

rely in their defence, they must prove the additional matter, it being traversed by the general replication."

In *Bellows* v. *Stone, supra,* the distinction between responsive and unresponsive matter in an answer was held to be between allegations upon those subjects upon which the bill requires answer and allegations of new matter not stated or inquired of in the bill and the test was said to be whether or not the subject-matter of the allegation in the answer in question might have been omitted from the answer without furnishing the plaintiff ground of exception. The Court, by Parker, C.J., say, at pages 470, 471:

"The reason why the answer of the defendant is evidence in any particular, and stands until it is overcome by evidence, is not because it is a direct denial of the plaintiff's statement, but because the plaintiff, by calling for a response or statement by the defendant, under oath, upon a particular subject, has, in effect, thus far made the defendant a witness, and cannot be heard to say that no dependence is to be placed upon the answer he has given. Whether he call upon him to make an answer which must directly affirm or deny some statement, or whether he require him to make a statement of the facts upon a particular subject matter, the principle is the same. . . . In other words, the plaintiff, by calling upon the defendant to answer, does not make him a witness as to all the matters that he may state, but only as to those matters upon which his bill calls for a statement."

And at page 475:

> "If the whole subject matter of the statement or allegation in the answer might have been left out, then the allegations in the answer upon that subject are in no sense responsive to the bill, the bill requiring no statement upon that point. But if the omission of some statement upon that subject would furnish just ground of exception to the answer, then the statement, to the extent to which it is required, and whatever its character, whether affirmative or negative, is but a response to the requisition of the plaintiff."

Tested by the above principles it is clear that the allegation in question was not evidence for the defendant.

Nor is the allegation in the answer such a direct and positive averment of fact as to make it evidence for the defendant. The allegation is that "Your orator further *submits* as a fact constituting a violation of law," etc. This does not constitute an allegation as of the knowledge of the defendant, or even an allegation or averment upon his ~~knowledge~~ and belief; and while the allegation of this section may be good as a pleading, the form of the answer precludes its use as evidence.

Daniell's Chancery Practice (5th ed.), vol. 1, 844:

> "The denial, however, by the answer must in such cases be positive, otherwise the rule will not apply,—as where a defendant by his answer denies a fact as to his belief only, or where it is a

mere constructive denial by the filing of a traversing note."

Copeland v. *Crane*, 9 Pick. 73.
Slater v. *Maxwell*, 6 Wall. 268, 275.

In *Copeland* v. *Crane, supra*, the Court, by Wilde, J., thus states and applies the rule at page 78:

"Thomas Crane states, in his answer, that he verily believes that Copeland had received his full share of all the profits arising from the partnership concerns, and that there was a balance due to the said Crane. Now it seems quite clear that such general allegations, containing matters of belief and conclusions from facts not particularly stated, are entitled to little or no weight in a hearing on the bill and answer. The answer is only conclusive as to facts directly and particularly averred; and not as to matters of belief, unless the grounds of belief are disclosed, and are deemed sufficient."

In *Slater* v. *Maxwell, supra*, the Court, by Mr. Justice Field, say, at page 275:

"But if a fact alleged be denied upon belief merely, or be denied equivocally or evasively, it may be sustained by the testimony of a single witness."

From the foregoing it is apparent that it was not established by the allegations of the answer that the witnesses to the deed were the clerks or servants of the notary.

Moreover, for the reasons stated under the third proposition, the deed was valid as a private instrument

even though it be assumed that the witnesses were the clerks or servants of the notary.

V.

Even if it be assumed that the deed of January 14, 1913, was null and void, the decree of the District Court should not have been reversed and the bill dismissed, but a decree of foreclosure should have been granted.

After concluding that the deed was null and void for the reason that there was a provision therein in favor of the notary and also on the ground that the witnesses were his clerks or servants, the Court of Appeals held that the bill should have been dismissed, saying, at page 99 of the record:

> "The bill should have been dismissed, it having been brought against Wilcox as the owner of the equity, when in fact he was not the owner, the deed to him being a nullity, and Landron not having been made a party. *Terrell* v. *Allison*, 88 U. S. 289; Whitehouse Equity Practice, Sec. 68."

Article 129 (R.S. 6813) of the Mortgage Law provides as follows:

> "If before the creditor shall enforce his claim against the estate mortgaged the property should pass into the hands of a third possessor, all proceedings prescribed in the foregoing article should be directed against him as the person subrogated to the rights of the debtor."

Assuming for the moment that the deed was a nullity, yet the defendant was claiming title to the prop-

erty included within its terms at the time of the foreclosure proceedings and was collecting the rent (Test. of Monserrat, r. p. 58).

It is submitted that even though the deed was a nullity, the defendant was the possessor of the property under the provisions of the article above quoted and that the foreclosure proceedings were therefore properly brought against him.

VI.

The decree of the Circuit Court of Appeals cannot be sustained upon any of the grounds raised by defendant's assignments of error which were not relied upon by the Circuit Court of Appeals as grounds for its reversal of the decree of the District Court.

a. Of the above, assignments 13, 14, 15 and 16 (r. pp. 66, 67), in one form or another, allege that the District Court erred in dismissing the bill of review.

The decree dismissing the defendant's bill of review (r. p. 46) was not reviewable by the Circuit Court of Appeals.

No appeal from this decree was taken to the Circuit Court of Appeals, the only appeal taken by the defendant being the appeal from the final decree of foreclosure of August 25, 1916 (r. p. 71).

A bill of review does not constitute a part of the original cause, but is an independent proceeding.

> *Lee County* v. *Rogers*, 7 Wall. 181.
> Daniell's Chancery Practice (5th ed.), vol. 2, 1575, note 3.

It follows that as there was no appeal from the decree dismissing the bill of review, and as the bill of

review is not part of the proceedings in which the plaintiff's bill was filed, the decree of the District Court dismissing the bill of review was not reviewable by the Circuit Court of Appeals.

But even if it be assumed that the action of the District Court in dismissing the bill of review was reviewable by the Circuit Court of Appeals, the action of the District Court in dismissing the bill of review was not error.

The defendant's assignment No. 13 (r. p. 66) sets forth that after the decree of foreclosure the defendant brought an action against Landron and plaintiff to set aside the deed of January 14, 1913; that defendant had the bill dismissed as against plaintiff, one of the therein defendants, and that thereafter a final decree against Landron to the effect that the deed was null and void was rendered; that defendant thereafter filed the bill of review to reverse the decree of August 25, 1916, and that said bill of review was dismissed on plaintiff's motion which action defendant alleged to be error.

The decree against Landron referred to in this assignment was *pro confesso*, Landron not having appeared, pleaded or answered, as appears from the allegations of the bill of review (r. pp. 40, 41), he having left the island and his representation by counsel being uncertain (r. p. 47).

With respect to the defendant's course in taking a decree *pro confesso* against Landron, dismissing against the plaintiff and then using the decree of nullity obtained against Landron for the purpose of concluding the plaintiff by means of a bill of review, the District Court say, at page 47 of the record:

"2. There does not appear to have been a neces-

sity for a bill of review. In case No. 975 there could have been a consideration of all original equities between the three parties interested which could not be raised in the answer to the bill in No. 946. This seems to have been contemplated, but at the last moment the plaintiff considered that a decree pro confesso against Landron, who had left the island and whose representation by counsel was uncertain, would fix all rights in regard to the property. Thereupon the plaintiff dismissed the bill as to the bank and was left with a decree pro confesso as to Landron and relies upon it. He voluntarily gave up the opportunity to litigate the points at issue with the principal party in interest, that is, the bank, which he had by amendment eliminated. But the decree he did obtain was not binding upon the bank, because the bank was no longer a party. It does not seem equitable for a plaintiff to prosecute a bill of review to cover remedies which were obtainable in a suit which he voluntarily dismissed as to the main party in interest."

The defendant's contention on this ground of error is that although the District Court's rulings and findings in the suit between plaintiff and defendant that the deed from Landron to defendant was valid were correct, yet the plaintiff is concluded on that question by the result of a subsequent decree *pro confesso* in a subsequent suit between defendant and Landron only. It is submitted that this contention is absurd.

But if it could be held that the plaintiff could be concluded as to the nullity of the deed by a decree *pro confesso* in a suit between defendant and Landron, yet

it does not follow that the bill of review should be sustained.

The function of a bill of review is to relieve a meritorious complainant from a clear miscarriage of justice where the remedy can be applied without mischief to the rights of innocent parties and without jeopardizing the stability of judicial decrees, and is a matter of discretion and not of absolute right even where error in the decree is apparent.

Hopkins v. *Hebard*, 235 U.S. 287.
Scotten v. *Littlefield*, 235 U.S. 407.

In *Hopkins* v. *Hebard*, *supra*, it was held as stated in the head-notes:

> "Notwithstanding this court has recently decided, in an action between North Carolina and Tennessee, that the boundary between them is different from that which the Circuit Court of Appeals had previously adjudged it to be in cases affecting titles to land now owned by third parties relying on the decrees of that court, it will not now overturn those decisions, as the stability of judgments and the protection of rights acquired in reliance upon them would, under the circumstances of this case, make the review inequitable."

In the above case it was sought to review a decree entered by a District Court on the ground that said decree was plainly erroneous in view of subsequent decisions of this Court.

It would be manifestly inequitable to reopen the decree in this case on account of a decree in a subsequent suit brought by defendant against Landron in which

the plaintiff had no opportunity to be heard for the reason that defendant voluntarily took a decree of dismissal as to him.

b. Assignments 14 and 15 (r. p. 66).

These assignments appear to require no discussion.

c. Assignment 16. "The court erred in dismissing the bill of review filed herein in overruling each and every of the grounds set forth therein" (r. p. 67).

Although it is submitted that this assignment is too vague and general to require notice, the plaintiff will argue briefly thereunder a ground for review relied upon in the plaintiff's bill of review, which is as follows:

> "Your petitioner further says and respectfully urges, that your Honor erred in holding that your petitioner was liable for the payment of the mortgage of $1700 sued for by the bank in the foreclosure suit, together with interest, costs and attorney's fees provided for therein, for the reason that it was shown by the witnesses of the plaintiff bank at the hearing that the said mortgage was to cover interest due and unpaid on the first mortgage of $4600 held by the said bank against Lopez Landron, it being apparent upon the face of the bank's bill of complaint that the said mortgages drew the maximum rate of twelve per cent under the law of Porto Rico, and that the interest due on the first mortgage of $4600 held by the said bank against Lopez Landron, it being apparent upon the face of the bank's bill of complaint that the said mortgages drew the maximum rate of twelve per cent under the laws of Porto Rico and

that the interest due on the first mortgage was thereby to draw twelve per cent per annum, and that the said mortgage was a usurious contract and not collectible under the laws of Porto Rico" (r. p. 44).

This matter was not set out as a defense in the defendant's answer. As a ground of review for matters apparent on the record it is probably improper because it deals with the evidence.

Act of Legislative Assembly of Porto Rico, March 1, 1902, as amended by Act of March 12, 1903, provides as follows:

Sec. 1 (R.S. sec. 4172). "That in the absence of an agreement in writing entered into and executed at the time, the rate of interest upon the loan or forbearance of money or goods or upon any variety of obligation or contract or upon unpaid judgments, shall be at the rate of six ($6) dollars annually, on each one hundred ($100) dollars or upon its equivalent in value and at the same rate for a greater or less sum or for a longer or shorter period. Provided, however, that no rate of interest shall be fixed by special agreement in excess of twelve ($12) dollars a year on each one hundred ($100) dollars or upon its equivalent of value. Within the limit here defined it shall be lawful to discount bills and notes and other similar obligations."

Sec. 4 (R.S. sec. 4175). "No person except as authorized by Section 3 of this Act (Sec. 4174 Revised Statutes), shall demand or receive, directly or indirectly, any money or goods, at any greater

rate of interest for the loan or extension of time of said loan, than the rate provided for herein.

"Any contract wherein or whereby there is reserved, accepted, or secured or agreed to be reserved, accepted or secured any greater sum or value than is allowed by this Act, is utterly void for all purposes, in so far as the interest is concerned; and a court of competent jurisdiction in a proper action may enjoin the collection of said interest, and any proceeding to enforce such contract shall be void, in so far as it refers to the interest."

The first mortgage for $4600 was dated July 29, 1909, was made for the term of one year and carried interest at the rate of 1 per cent monthly, payable four months in advance (r. p. 81). The second mortgage to the bank for $1700 was executed December 3, 1912, for the term of one year, and the interest thereon was at the rate of 1 per cent monthly payable in advance every four months (r. p. 84).

It appeared at the trial from the evidence of the witness Fernando that the $1700 mortgage to the bank was an enlargement of the first mortgage; that it represented partly interest on the first mortgage and partly loan; that $1480.20 was interest on the first mortgage, and the difference between that and the $1700 was paid to Landron in cash (r. pp. 49, 50). The defendant's claim is that the $1700 mortgage was a method of collecting interest upon the 12 per cent interest limited by the statute and was therefore void.

The District Court disposed of this matter as follows:

"It is also set up that there was an error in the

decree because the second mortgage was void in that it covered interest upon interest. The Porto Rican law avoids the usury, not the principal. (Act March 1, 1902, Sec. e; Compilation 1911, Sec. 4175.) The new mortgage, however, is not shown to transgress any law. It purports to be for a certain additional advance plus interest then accrued. In other words, the transaction amounted to a rest, at which interest then due was figured out and not paid. In such case it ceased to be interest and became a debt which could be deferred, secured by mortgage, or handled in any other way the parties saw fit. The amount of interest is large, but does not exceed what is allowed by contract under the local law. There is no showing that there was any fraud or that any advantage was taken which calls for the interposition of a court of equity. Moreover, if there is any mistake in the amount due under the decree for foreclosure, it could have been brought up by exception or by motion questioning the amount figured by the clerk and adopted by the court. There was no need for an independent proceeding in this regard'' (r. p. 49).

The question was not discussed by the Circuit Court of Appeals. The above ruling of the District Court is in accord with the universal rule that in such cases the usury laws are not violated by the creditor's forbearing to compel payment of interest due and taking an agreement to pay the amount of interest due with interest thereon.

Camp v. *Bates,* 11 Conn. 488.
Otis v. *Lindsey,* 10 Me. 315.

Magruder v. *Bank,* 18 Ark. 9.
McGovern v. *Ins. Co.,* 109 Ill. 151.
Austin v. *Bacon,* 28 Wis. 416.
Holland v. *Mosteller,* 51 N.C. 582.
Meeker v. *Hill,* 23 Conn. 574.
Keiser v. *Decker,* 29 Neb. 92.

d. Assignments 1 to 6, inclusive (r. pp. 63, 64).

The errors charged in these assignments are the actions of the Court in granting plaintiff's motion to dismiss the defendant's original answer and the defendant's cross-bill and in denying the defendant's motion for a decree *pro confesso* on his cross-bill.

Without going into this question at length it would seem to be sufficient to call attention to the fact, as was pointed out by the Circuit Court of Appeals (r. p. 93), in holding that this ground of complaint was without merit, that neither the original answer nor the cross-bill alleged fraud with respect to the deed of January 14, 1913, and that the original answer contained no allegation with respect to the nullity of the deed, as did the cross-bill, whereas defendant's amended answer which he was allowed to file contained, among the other defenses therein, the defense of nullity of the deed and that therefore defendant could have been in no way injured by the Court's action on these motions.

e. Assignment 12 (r. p. 65).

The error alleged in this assignment is that after defendant filed his bill of review he filed a motion asking the Court to suspend the foreclosure sale under the decree of August 25, 1916, and that the motion was denied.

There is no such motion or the denial thereof in the record.

f. Assignments 18, 19 and 20 (r. p. 67).

> "18. The court erred, if the deed of January 14, 1913, Exhibit E for the plaintiff, were not null and void, in finding for the complainant as to the mortgage of $1700, with interest thereon, costs and attorney's fees.
>
> "19. If the deed, Exhibit E for the plaintiff, were not void, and if the court did not err in finding for complainant as to the mortgage of $1700 with interest thereon, costs and attorney's fees, the court erred in finding for the complainant as to the interest on the said mortgage of $1700, costs and attorney's fees.
>
> "20. The court erred in finding for the complainant as to the mortgage of $1700, interest and attorney's fees for the reason that to so find was against the weight of the evidence."

All questions which were raised by the record on the appeal to the Circuit Court of Appeals and which might be covered by these assignments have been dealt with.

The defendant, however, argued on his brief before the Circuit Court of Appeals a question which was not raised by his answer concerning the validity of the $1700 mortgage. The claim was thereby apparently intended to be made that the $1700 mortgage, being an enlargement or extension of the $4600 mortgage, could not under the provisions of the Mortgage Law be enforced against the defendant. The provisions of the

Mortgage Law in so far as they have to do with the question are as follows:

> "Art. 114 (R.S. sec. 6798): A mortgage constituted to secure a credit which earns interest shall secure with regard to third persons, in addition to the principal, only the interest for the two years last past and that part of the current year which shall have accrued.
>
> "Art. 115 (R.S. sec. 6799): After the expiration of three years from the date the loan began to draw interest which remains unpaid, the creditor may demand that the mortgage created be extended on the same mortgaged property, for the purpose of securing the interest corresponding to the first of said years, but only in case that the obligation to pay part of the interest has matured, and the debtor has failed to satisfy it.
>
> "If the creditor should avail himself of this right after the expiration of three years he may demand that the mortgage be extended to cover all the interest which at the time of making such extension may not be secured by the first mortgage; but in no case shall the mortgage created prejudice a person who had previously and after the two years acquired an interest in the mortgaged property."

It is apparent that as the defendant did not acquire his interest in the mortgaged property under his deed until long after the plaintiff's second mortgage, he is not affected by the provisions of the last sentence in article 115, which is only intended to make it clear that the new mortgage shall not make a prior purchaser

liable for interest for which he would not have been liable under article 114 if the new mortgage had not been given.

On the whole case it is evident that defendant, under the deed of January 14, 1913, became the owner of the property in question, that it was subject to plaintiff's first mortgage of $4600, which was duly recorded at the time of said sale, and to plaintiff's second mortgage for $1700, of which defendant had knowledge at the time of said transfer, both of which mortgages defendant assumed and agreed to pay and that the Court of Appeals erred in ruling and finding otherwise and in reversing the decree of the District Court.

It is therefore respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and the decree of foreclosure of the District Court affirmed with costs.

BOYD B. JONES,
PHILIP N. JONES,
Solicitors for Appellant.

Act of April 12, 1900, c. 191, 31 Stat. 84, 85:

"SEC. 34. Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court. The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters, and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said court shall be held at San Juan commencing on the second Monday in April and October of each year, and also at Ponce on the second term in January of each year, and special terms may be held at Mayaguez at such other

stated times as said judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language."

"SEC. 35. Writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language."

Sections 128, 238, 244 and 246 of the Judicial Code as originally enacted:

"SEC. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise pro-

vided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"SEC. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

"SEC. 244. Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme

Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts."

"SEC. 246. Writs of error and appeals from the final judgments and decrees of the supreme court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party

or of other competent witnesses, exceeds the sum or value of five thousand dollars."

By the Act of January 28, 1915, c. 22, sec. 2, 38 Stat. 803, sections 128 and 238 were amended by including within their provisions the United States District Court for Porto Rico.

Section 244 was repealed and section 246 was amended to read as follows:

"SEC. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the

United States within six months from the date of such judgment or decree." Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of five thousand dollars, may be taken and prosecuted in the circuit court of appeals.

A more precise translation of section 1193 would substitute the word "admitted" for the words "legally acknowledged."

Section 1193, which is the same as section 1225 of the Civil Code of Spain, as it appears in the original Spanish text is as follows:

> "Artículo 1225.—El documento privado, reconocido legalmente, tendrá el mismo valor que la escritura pública entre los que lo hubiesen suscrito y sus causahabientes."

The word "reconocido" is the past tense of the verb "reconocer," which is translated in Appletons' New Spanish-English and English-Spanish Dictionary, at p. 463, as follows:

> "Reconocer, va. (for irr. V. Conocer) to scan, scrutinise, inspect, examine closely; to recognise; to own, confess; acknowledge; to consider, to contemplate; to accept or admit; to comprehend; to conceive; (mil.) to reconnoitre, to scout; (pol.) to recognise the official existence of a country, or to sanction acts done in another land; (com.) to acknowledge.—vr. to repent; to confess one's self culpable; to judge justly of one's own self."

The decisions of the Supreme Court of Porto Rico establish this as the proper interpretation of the section.

Rivera v. *Miranda*, 10 P.R.R. 224.

In the opinion in the above case, after reciting that "under date of August 13, of the same year [1892], Miguel Miranda y Rivera, by private document, the

authenticity of which he has acknowledged, confessed that Francisco Miranda had, by order of the heirs of Rosalia Cordero, conveyed to him the deed to a tract of land which they possessed . . ." (pp. 225-226). "2.—And that Miguel Miranda acknowledged the private document of August 12, 1892" (p. 228). The Court say, at p. 233:

> "We accept as valid and efficient in law the private document executed by Miguel Miranda on August 13, 1892, because it has been acknowledged by the latter in court and, therefore, has the same legal value as a public instrument, according to article 1225 of the former Civil Code, section 1193 of the revised Code."

In *Hernandez* v. *Ortiz*, 18 P.R.R. 1012, with regard to a document which had not been acknowledged before a notary, the Court say, at p. 1016:

> "With regard to Ortiz Sainz and Oramas, the said receipt must take effect from the date on which it was made, according to section 1193 of said code, *for the document having been acknowledged by both*, it has the same force with regard to them as if it were a public instrument." (Italics ours.)

In *Cintron* v. *Sola*, 22 P.R.R. 245, of a promissory note which was not acknowledged before a notary, the Court say, at p. 250:

> "The genuineness of the note has not been impeached and must be admitted, pursuant to section 119 of the Code of Civil Procedure; and being

genuine, according to section 1193 of the Civil Code, it has the same force as a public instrument between those who may have signed or their successors in interest."

Of the instruments referred to in section 1225 of the Spanish Civil Code, which is the same as section 1193 of the Porto Rican Code, it is said in the Commentaries of Manresa Y Navarro, on the Spanish Civil Code, edition of 1907, volume 8, p. 448:

"These are the documents that the parties enter into by themselves or, at most, in the presence of witnesses but without the intervention of a public functionary who authorises them thus giving them authenticity. Also enter into this group, in accordance with what is determined in Art. 1223 of the Code, (Art. 1191 of the Porto Rican Code) to the commentary on which we refer, the defective public deeds on account of the incompetence of the notary authorizing the same or any other fault that affects exclusively the especial form of the same; always, of course, if the same have been signed by the parties, in accordance, as we have seen, with the requirements of the article referred to." (Literal translation.)

In connection with the interpretation of this section see Acts and Resolutions of the First Session of the Ninth Legislature of Porto Rico, Number 8, approved November 12, 1917.

"Section 1.—That in case of discrepancy between the English and Spanish texts of a statute passed by the Legislative Assembly of Porto Rico,

the text in which the same originated in either house, shall prevail in the construction of said statute, except in the following cases; (a) If the statute is a translation or adaptation of a Statute of the United States or of any State or Territory thereof, the English text shall be given preference over the Spanish. (b) If the Statute is of Spanish origin the Spanish text shall be preferred to the English. (c) If the matter of preference cannot be decided under the foregoing rules, the Spanish text shall prevail."